

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	§	
	§	CASE NO. 08-35653-KRH-11
CIRCUIT CITY STORES, INC.	§	
	§	Chapter 11
Debtor	§	

**TEXAS COMPTROLLER'S AMENDED OBJECTION TO CONFIRMATION
OF FIRST AMENDED JOINT PLAN OF REORGANIZATION**

The Texas Comptroller of Public Accounts ("Texas Comptroller"), appearing through the Texas Attorney General's Office, objects on the following grounds to confirmation of the First Amended Joint Plan of Reorganization (the "Plan") proposed by the Debtors and Official Committee of Unsecured Creditors.

Amendments to Prior Objection

1. On October 7, 2009, the Texas Comptroller filed an objection [docket item 5124] to confirmation of the Plan. Since that date, the Debtor's 2009 Texas franchise tax return has been processed and the Texas Comptroller has recently filed an administrative expense proof of claim, based on such return, for \$1,181,459.55, reflecting tax principal (\$964,063.29), penalties (\$192,812.65) and interest (\$24,583.61 through February 19, 2010, within interest continuing to accrue at \$112.25 per day). This amended objection addresses issues relating to such new claim, in addition to issues set forth in the original objection relating to the Comptroller's prepetition priority tax claims.

2. The Plan's treatment of administrative expense tax claims, including penalty and interest owed on post-petition taxes, is not clear in several respects. Plan Art. 1.3 proposes an Administrative Expense Claim Objection Deadline of at least 120 days, with such deadline being

further extendable by court order. Although Plan Art. III.A.1 proposes full payment of administrative expense claims, such provision indicates that payment will only be made on the earlier of (i) the Distribution Date following the date an Administrative Claim becomes an Allowed Administrative Claim or (ii) the date that is at least 90 days after the date an Administrative Claim becomes an Allowed Administrative Claim. Therefore, payment of Administrative Claims, including the Texas Comptroller's filed Administrative Claim, may be delayed for a considerable time after the Plan's Effective Date.

2. Bankruptcy Code § 1129(a)(9)(A) requires that holders of administrative expense claims – which under § 507(a)(2) and § 503(b)(1) include post-petition taxes, penalties and interest – "will receive on account of such claim cash equal to the allowed amount of such claim." Such amount is to be received "on the effective date of the plan."

3. There is no reason the Texas Comptroller's administrative expense claim should not be paid in full on or before the Effective Date. The claim is based upon the Debtor's own signed tax return, plus statutory penalties and interest that are not subject to dispute. Delaying payment until well after the Effective Date does not comply with § 1129(a)(9)(A) and is not in the best interest of lower-priority creditors, since interest will continue to accrue during any payment delay.

4. Plan Art. III.A.1 does not expressly provide for the payment of post-Effective Date interest during any period between the Effective Date and payment of an Allowed Administrative Expense Claim. Plan Art. V.F contains a general prohibition against paying interest prior to the date a claim becomes an Allowed Claim. It is unclear if Art. V.F is intended to deny administrative expense claimants post-Effective Date interest on their Allowed Administrative Expense Claims, but if such denial of interest is intended, Art. V.F would be inconsistent with § 1129(a)(9)(A)'s requirement for

full payment on the Effective Date.

5. The definition of Administrative Claim in Plan Art. 1.2 is also unclear. That definition includes a reference to Claims of governmental units for "taxes" [lower case]. "Taxes," a capitalized term, is defined in Plan Art. 1.121 to include "any and all taxes and all interest, penalties, or similar liabilities with respect thereto." By referencing using the undefined, lower-case term "taxes" in Art. 1.2 rather than the defined term "Taxes", Art. 1.2 could be read to only confer administrative expense status on tax principal amounts, but not interest and penalties. That reading would be inconsistent with Bankruptcy Code § 503(b)(1)(C) – which expressly grants administrative expense status to penalties on post-petition taxes – and relevant case law that confirms the administrative expense status of interest on unpaid post-petition taxes. In re Friendship College, Inc., 737 F.2d 430 (4th Cir. 1984); In re Flo-Lizer, Inc., 916 F.2d 363 (6th Cir. 1990); United States v. Ledlin (In re Mark Anthony Construction, Inc.), 866 F.2d 1101 (9th Cir. 1989); United States v. Cranshaw (In re Allied Mechanical Services, Inc.), 885 F.2d 837 (11th Cir. 1989). The Plan should either be corrected to clarify that penalties and interest on post-petition taxes are included in Administrative Claims of tax authorities, or any confirmation order should so provide.

6. The Debtor in Possession should have paid its 2009 Texas franchise taxes when the franchise tax return was filed. Liability for such taxes arose on January 1, 2009, subsequent to the November 10, 2008 petition date. Congress amended 28 U.S.C. § 960 as part of the 2005 BAPCPA amendments to expressly require that post-petition taxes owed by a bankruptcy estate "shall be paid on or before the due date of the tax under applicable nonbankruptcy law." The Debtor in Possession violated § 960 when it failed to pay its 2009 Texas franchise taxes along with its return, and the Debtor in Possession remains in violation of § 960 at this time. The taxes (plus penalty and interest)

should be paid immediately, as compelled by § 960. Additional interest accruals, like the substantial penalties and interest that have already accrued, will only reduce remaining funds distributable to general unsecured creditors. It is therefore not in this bankruptcy estate's best interest, or in the best interest of general unsecured creditors, to defer payment of post-petition taxes in violation of § 960.

7. Under 11 U.S.C. § 1129(a)(3), a plan proponent has the burden of proof to show that the plan has been proposed in good faith and not by any means forbidden by law. Since the Debtor in Possession is in knowing and continuing violation of 28 U.S.C. § 960 by failing to pay post-petition taxes when due, the Plan proponents cannot make the showing required by § 1129(a)(3).

Restatement of Previous Objections

The remainder of this objection restates, for the sake of completeness, grounds for denying confirmation of the Plan that relate to the Texas Comptroller's prepetition priority claims.

8. The Texas Comptroller timely filed a proof of claim for \$1,690,627.18 for pre-petition sales-use tax. Based upon tax liens perfected pre-petition against the Debtors' assets in Texas, the claim was filed as a secured claim. The Comptroller believes the claim to be an oversecured claim. To the extent of any shortfall in collateral value (the Comptroller does not believe there is any such shortfall), the claim is entitled to priority treatment pursuant to 11 U.S.C. § 507(a)(8)(C).

9. As an oversecured creditor, the Texas Comptroller is entitled to (i) post-petition, pre-Effective Date interest under 11 U.S.C. § 506(b), and (ii) post-Effective Date interest for any period during which the Texas Comptroller's secured claim remains unpaid. Plan Art. III. B.1 attempts to deny the Texas Comptroller its statutory right to § 506(b) interest and at the same time unilaterally declare the Texas Comptroller's claim to be unimpaired and deny the Texas Comptroller the right to vote on the Plan as part of an impaired class.

10. The Plan does not comply with 11 U.S.C. § 506(b) and therefore, under § 1129(a)(1), (2) and (3), cannot be confirmed.

11. Since the Plan proponents failed to properly solicit votes from any oversecured creditors under the incorrect assumption that their claims were unimpaired, the Plan proponents have not complied with § 1126 and § 1129(a)(7) and (8) in the Plan solicitation process. Confirmation must therefore be denied under § 1129(a)(2) and (3).

12. Since Plan Art. III.B.1 fails to provide for post-Effective Date interest on the Texas Comptroller's oversecured claim, and since Plan Art. V.F expressly prohibits the payment of any interest between the Effective Date and the date a claim becomes an Allowed Claim (i.e., during the period any claim objection may be pending), the Plan fails to comply with § 1129(b)(2)(A) and § 511. Those sections require that post-Effective Date interest under applicable non-bankruptcy be paid on allowed secured claims so that they receive present value equal to the amount of such claims.

13. Bankruptcy Code § 362(b)(9) expressly excludes from the automatic stay governmental audits to determine tax liability. The Debtors did business in Texas, both pre- and post-petition, and were required by Texas Tax Code § 111.004 et seq. to cooperate in tax audits that the Texas Comptroller attempted to conduct. Despite multiple requests to conduct a sales-use tax audit for the pre-petition period, the Debtors refused to cooperate. Written notice of such failures and specific requests for cooperation were then made to Debtor's counsel, who ignored such notice and requests, refusing to even respond.

14. Under 28 U.S.C. §§ 959(b) and 960, the Debtors in Possession were required to obey state law, including specifically tax laws, in conducting their business. The Debtors violated §§ 959(b) and 960 by refusing to obey Texas tax law authorizing audits of the Debtor's books and

records and requiring the Debtors in Possession to cooperate with such audits. The Debtors in Possession remain in continuing violation of those statutes, and therefore cannot confirm a plan, pursuant to 11 U.S.C. § 1129(a)(2) and (3), which require that plan proponents comply with applicable provisions of Title 11, be proposed in good faith, and not by any means forbidden by law. The Debtors' illegal failure to comply with tax audits bars them from confirming a plan.

15. Plan Art. V.H attempts to limit the Texas Comptroller's setoff rights. Under 11 U.S.C. § 553, setoff rights survive bankruptcy and are not affected by other sections of the Bankruptcy Code. IRS v. Luongo (In re Luongo), 259 F.3d 323 (5th Cir. 2001); In re DeLaurentiis Entertainment Group, Inc., 963 F.2d 1269, 1277 (9th Cir. 1992); Pettibone Corp. v. United Staets (In re Pettibone Corp.), 151 B.R. 960, 964 (N.D. Ill. 1993). Further, a confirmation objection is sufficient to preserve setoff rights if a plan attempts to abrogate or limit them. In re Alta+Cast, 2004 WL 484881 (Bankr. D. Del.) The Texas Comptroller objects to any alteration of its setoff rights.

16. Plan Art. VIII.G contains broad exculpation provisions that, if read literally, would excuse parties' non-compliance with applicable statutes, including tax laws. Federal law, as discussed above, requires that debtors in possession and trustees comply with applicable laws in operating a business under Chapter 11. Nothing in the Bankruptcy Code authorizes bankruptcy courts to exculpate multiple parties from complying with applicable laws, including tax laws, post-confirmation. There is no authority for excusing compliance with the law, and statutory violations, including violations of tax laws, should be excepted from the Plan's exculpation provisions.

17. To the extent, if any, that the Texas Comptroller may hold claims entitled to priority under 11 U.S.C. § 507(a)(8), such claims are entitled, under 11 U.S.C. §§ 1129(a)(9)(C) and 511, to post-Effective Date interest at the rate determined by applicable non-bankruptcy law. (4.25% in

Texas during 2009, pursuant to Texas Tax Code § 111.060.) Plan Art. III.A.2 attempts to impose a much-lower "Case Interest Rate". That violates §§ 1129(a)(9)(C) and 511, and the Plan therefore cannot be confirmed under § 1129(a)(1) and (2), which require that a plan and plan proponents comply with all applicable provisions of Title 11. The Plan proponents, represented by experienced bankruptcy counsel, know full well that a low-ball "Case Interest Rate" does not comply with §§ 1129(a)(9)(C) and 511, and they therefore are not proceeding in good faith in attempting to deprive priority tax creditors of their statutory right to interest, in violation of § 1129(a)(3).

Wherefore, the Texas Comptroller requests that confirmation of the Plan be denied and that the Comptroller have such other relief to which it may be entitled.

Respectfully submitted,

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